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IN THE

Supreme Court of the United States

October Term, 1959.

No. 705

KEA STEAMSHIP CORPORATION,

Petitioner,

v.

EDWARD S. MESLE

and

HAENN SHIP CEILING AND REFITTING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Kea Steamship Corporation, respectfully prays that a Writ of Certiorari may issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on September 30, 1958 and affirmed, after rehearing, on November 18, 1958, thereby affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 12,540.

OPINIONS OF THE COURTS BELOW.

The judgment of the District Court for the Eastern District of Pennsylvania is unreported, and is printed in Appellant's Appendix in the court below at page 168a. The opinion of the Court of Appeals and the supplementary opinion following rehearing have not been reported and appear at pages 13 and 22 in the Appendix to this petition.

JURISDICTION.

The admiralty jurisdiction of the District Court was invoked because the action involved personal injuries sustained by the employee of a shore contractor engaged in repairing defective shorings in the hold of petitioner's vessel while afloat in navigable waters of the United States.

The judgment of the Court of Appeals was entered on September 30, 1958. Petitioner obtained a rehearing, which was followed by a supplementary opinion filed by the Court of Appeals on November 18, 1958.

The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

1. Does the ship's warranty of seaworthiness extend to a shore workman who is injured while engaged in repairing an obviously unseaworthy condition which his employer has contracted to repair?

2. If, under such circumstances, the shipowner is liable exclusively on the theory of unseaworthiness, is the shipowner not entitled to indemnity from the shore contractor whose substandard performance of the repair work foreseeably led to this liability?

STATEMENT OF THE CASE.

Mesle, a carpenter employed by Haenn Ship Ceiling and Refitting Corporation, was engaged in removing a split and defective shoring in the hold of S. S. "Sunion" when one end shifted and threw him off the sweat battens where he had climbed up to chop off the cleats holding the lower end of the shore.

The shoring shifted due to the absence of "toe-nailing" which presumably would have held it steady after the cleats were knocked loose. However, when secured by cleats alone such shorings are fit for their intended purpose of bracing the shifting boards erected in the hold of vessels to prevent grain cargo from shifting at sea. The shifting board and shorings in this instance had been installed by grain fitters in another port, and neither the vessel's officers nor the repairmen at Philadelphia knew or could have seen that the customary "toe-nailing" had been omitted until the cleats were removed from the end of the shoring.

Mesle sued petitioner, as shipowner, to recover damages, alleging negligent failure to furnish him with a safe place to work and a breach of the shipowner's warranty of seaworthiness because this particular shoring had not been nailed in addition to being cleated. Petitioner denied any warranty of seaworthiness with respect to the defective shoring, and denied any negligence in regard to the lack of "toe-nailing." Petitioner then impleaded Haenn, as Mesle's employer, claiming indemnity for any recovery made by Mesle on the ground that if the accident resulted from an unsafe or unseaworthy condition, such condition had been foreseeably caused by Haenn's substandard performance in removing the defective shoring.

The District Court found that petitioner was solely at fault in negligently failing to furnish a safe place of work and in failing to warn the repairmen about the absence of "toe-nailing;" and it further found that the accident was directly caused by the unseaworthiness of the shoring un-

connected with any neglect of the shore contractor to perform the contracted services in a safe, proper and workmanlike manner. These findings were substantially modified by the Court of Appeals, which found that there was no negligence on the part of the officers and crew of the vessel since they had no means of knowing that the shore had not been nailed; and that the shoring when secured by cleats alone was sound and fit for its functional purpose of bracing the shifting boards at sea. The appellate court concluded that the absence of nailing rendered the shoring unfit and unsafe *for the purpose of its removal.* In this respect the petitioner was held to be solely liable for the accident, and the judgment of the District Court was affirmed.

Rehearing was granted on petitioner's contention that this ruling conflicted with the court's prior decision in *Bruszewski v. Isthmian S. S. Co.,* 163 F. 2d 720 (C. A. 3, 1947), certiorari denied 333 U. S. 828 (1948), and similar decisions in this and other jurisdictions, holding that "liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unseaworthy."

Rehearing was further granted upon petitioner's contention that the court had misapplied *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* 350 U. S. 424 (1956), in denying indemnity against Haenn on the ground that Haenn had not originally installed the grain fittings.

The Court of Appeals affirmed its decision in a supplementary opinion stating that there was no evidence that Haenn was responsible for the condition which caused the accident, implying that the lack of "toe-nailing" was the sole cause without discussing the evidence of Haenn's substandard performance without which the accident would not have occurred.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision Is in Conflict With Decisions in the Second and Ninth Circuits, and With the Bruszewski Decision in the Third Circuit.

Prior to the present decision, the law seemed to be settled that the shipowner's warranty of seaworthiness could not logically be extended to persons engaged for the express purpose of correcting an unseaworthy condition.

In *Byars v. Moore-McCormack Lines*, 155 F. 2d 587, 588 (C. A. 2, 1946), the court held that it was not the business of the ship's officers "to safeguard any of the contractor's men against dangers in connection with the defective hatches that were to be repaired," and stated the general rule in the following terms:

> "An employee cannot recover for injuries received while doing an act to eliminate the cause of the injury. As was said in Mullin v. Genesee County El. L., P. & Gas Co., 202 N. Y. 275, at page 279, 95 N. E. 689, 690: 'The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe. If a man is engaged in tearing down a house he is constantly exposed to dangers of his own creation.'"

In *McDaniel v. The M/S Lisholt*, 257 F. 2d 538, 541 (C. A. 2, 1958), the Second Circuit held that no warranty of seaworthiness applied to a shoreside fireman who boarded the vessel for the express purpose of preventing further fire damage after the ship's oil cargo had caught fire during discharge and the blaze had been extinguished. While he was investigating the source of ammonia fumes in the ship's refrigerator room, he was injured by a flash explosion. The Court said:

"One of the purposes for which the libellant came aboard was to make the inspection designed to discover the condition that resulted in this injury. One cannot recover for injuries received in the performance of acts calculated to eliminate the actual cause of the injury."

The same result was reached in *Filipek v. Moore-McCormack Lines*, 258 F. 2d 734, 737 (C. A. 2, 1958), where it was held that no warranty of seaworthiness extended to a shore worker injured by a hidden defect in a boom which he had been expressly hired to test.

The *Byars* decision was cited and followed by the Third Circuit in *Bruszewski v. Isthmian S. S. Co.*, 163 F. 2d 720 (C. A. 3, 1947), certiorari denied 333 U. S. 828 (1948). The injured workman was employed by a shore contractor who had been hired by the vessel to repair a broken boom. In the course of making the repairs on the boom, a loose block fell and struck the plaintiff. It was held that no warranty of seaworthiness was involved. The court said (at page 722) that: "liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unseaworthy. To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms. * * * Applying this principle to the case at bar, we deem it irrefutable that the broken boom, an elaborate mechanism, presented an obvious danger to those removing it."

In a subsequent case the Third Circuit refused to extend the doctrine to persons other than those expressly engaged to correct the unseaworthy condition, such as longshoremen handling cargo. Referring to the *Bruszewski* decision, the court said: "It means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work." *Gindville v. American-Hawaiian S. S. Co.*, 224 F. 2d 746, 747 (C. A. 3, 1955).

The Ninth Circuit in *Kulukundis v. Strand*, 202 F. 2d 708, 710 (C. A. 9, 1953), approved the principle that a repairman injured while correcting an unseaworthy condition was not entitled to a warranty of seaworthiness, but this exception did not apply to longshoremen hired to "line" the holds for carrying grain where no defective structure was to be repaired.

The same principle has been applied in several lower court decisions. *Armento v. U. S.*, 1948 A. M. C. 478; 74 F. Supp. 198 (E. D. N. Y.); *Hiltunen v. West Coast Line*, 1951 A. M. C. 517 (St. Ore.); *Pinion v. Mississippi Shipping Co.*, 1957 A. M. C. 2308, 156 F. Supp. 652 (E. D. La.); *Lyon v. United States et al.*, 163 F. Supp. 206, 208 (E. D. N. Y., 1958).

In the present case, the Third Circuit attempted to distinguish *Bruszewski* on the basis that the warranty of seaworthiness would not apply if the accident had been caused by the crack in the shoring which necessitated the repair work, but it did apply to the absence of toenailing the end of the shoring. In other words, the court found that the ship's warranty of seaworthiness applied to the end of the shore, but not to the middle.

This orbit of liability was further limited by the finding that the fastening of the shoring was "fit for its intended purpose" and therefore seaworthy when performing its function as a brace to maintain stability of the grain cargo while the ship was at sea. To reach the conclusion it did, the court predicated its findings upon the assumption that the accepted definition of an appurtenance as being seaworthy when it is "fit for the intended purpose" could be divided into two categories, namely, fit for performing its function in the manner for which it was designed, and fit in the sense of equipment supplied by the vessel for some anticipated form of activity in the course of normal operation.

The court found that the use of cleats without toenailing was seaworthy in the first category, because such a shoring could clearly perform its intended functional

purpose, but that it was unseaworthy in the second category, because the absence of toe-nailing created a hazard in the course of removing the shores, which was a normal and anticipated activity of the vessel's operation.

There is no precedent for this division of the accepted definition of "seaworthiness." It was not even remotely suggested in any of the decisions heretofore cited which involved injuries sustained while correcting an unseaworthy condition. It is directly contrary to the rationale of the *Bruszewski* case, where the workman was not injured by the broken portion of the boom but by a loose block which fell from the boom during removal. This principle was accepted by the Ninth Circuit in *Kulukundis v. Strand, supra*. It conflicts with the basis of the *Byars* case, *supra*, in the Second Circuit, which emphasized that "it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe."

A conflict between the decisions of the courts of appeals has been created which urgently requires final decision by the Supreme Court of the United States.

II. The Decision Conflicts With Applicable Decisions of the Supreme Court of the United States.

In the first opinion, the Third Circuit summarily disposed of petitioner's indemnity claim against the impleaded respondent by pointing out that the grain fittings had not been installed by the same shore contractor, which was contrary to the situation in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956).

The supplementary opinion filed after rehearing modified this ground to the extent of stating that "there was no evidence of impleaded respondent's responsibility for the particular condition."

This statement of the law conflicts with the decision of the Supreme Court of the United States in the *Ryan* case, *supra*, and the subsequent decision in *Weyerhaeuser*

Steamship Co. v. Nacirema Operating Co., Inc., 355 U. S. 563 (1958).

In the *Ryan* case, indemnity was allowed to the shipowner for damages paid to an injured longshoreman arising from an accident caused by negligent stowage of cargo. The cargo had been negligently stowed by Ryan's employees at the loading port. The accident occurred while other Ryan employees were unloading the same cargo at another port several days later. The basis of granting indemnity was not the incidental circumstance that Ryan had been the stevedoring contractor at both ports, but that Ryan had caused the accident by failing to perform its contracted services in a safe, proper and workmanlike manner.

In the *Weyerhauser* case, the indemnity suit was remanded for a new trial, reversing summary judgment in favor of the stevedoring contractor, where the longshoreman was injured during discharge of cargo because of the unsafe condition of a deck shelter erected by the same stevedoring contractor's employees while the cargo was being delivered to the vessel at another port. The court held that the evidence was sufficient to sustain a verdict in favor of the shipowner on the indemnity issues involved and should have been submitted to the jury, pointing out that the basis for indemnity rests upon negligent conduct of the stevedoring contractor's employees which foreseeably led to the shipowner's liability to the longshoreman. As in *Ryan*, the law as stated did not depend upon the identity of the indemnitor, or the fact that the negligent conduct occurred at another time and place, but solely upon the indemnitor's breach of its contractual duty to perform services in a safe, proper and workmanlike manner.

If substandard performance renders a shore contractor liable to indemnify a shipowner for accidental injuries to longshoremen taking place at a time and location far removed from the incidents which caused the accident, the shipowner's right to indemnity should be even more clearly established where the substandard performance and

the accident itself occur almost simultaneously, as they did in this case.

The present decision of the Third Circuit limiting indemnity to the party responsible for failing to toe-nail the shorings fails to give full and proper effect to the decisions in *Ryan* and *Weyerhauser*. By so misinterpreting the law, the court excluded all consideration of evidence sufficient to prove that this accident would not have happened except for substandard performance of the repair work contracted by the impleaded respondent. There was ample evidence that Haenn's foreman brought about the accident by assuming that the port shoring had been nailed when the starboard shoring had already fallen free; by ordering Mesle to knock off the cleats with a hammer when the ship's winches should have been used to break the shoring loose without risk of accident; and by ordering Mesle to climb up the sweat battens, which the courts have consistently held are not to be used by shore workmen as a substitute for ladders (Appellant's Appendix 50a, 51a, 79a, 87a, 88a; 32a, 65a, 98a, 100a).

This conflict with the recent decisions of the Supreme Court of the United States requires review and appropriate correction in conformity with the *Ryan* and *Weyerhauser* cases.

III. The Decision Has Decided Important Questions of Federal Law Which Should Be Settled by This Court.

In both aspects of this case which have already been discussed, the Third Circuit has decided important questions of maritime law which create conflict in matters which should be settled by this court.

The attempt to subdivide the established and traditional definition of "seaworthiness" into two categories is arbitrary, confusing, and without precedent. None of the authorities cited in the opinion refer to such categories. The seaworthiness of a vessel and its appurtenances has always been measured by "fitness for the intended pur-

pose" in terms of carrying out the function for which they were furnished. Function is the essential characteristic of a seaworthy appliance; if it cannot function properly as it was intended to be used in the normal operations of the ship, it is to that extent unfit and unseaworthy. The court in this case found that the cleating of the shores made them functionally fit, and therefore seaworthy.

Altering the equipment of a vessel while in port may involve considerations of "safe place to work" but not functional fitness. The shipowner's liability to persons injured through failure to furnish a safe place to work rests upon proof of negligent conduct, which the court found did not exist in this case. Any such arbitrary extension of "liability without fault" is a matter of extreme concern to the maritime industry.

It is equally important to prevent misinterpretation of the *Ryan* and *Weyerhauser* cases, defining the basis for the shipowner's right of indemnity. If this right is determined by the indemnitor's breach of a contractual obligation to perform services in a safe, proper and workmanlike manner, it may be asserted against any shore contractor whose substandard performance has caused the accident, even though both events occurred at the same time and place, and all such evidence must be considered. In the present case, it was excluded.

CONCLUSION.

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

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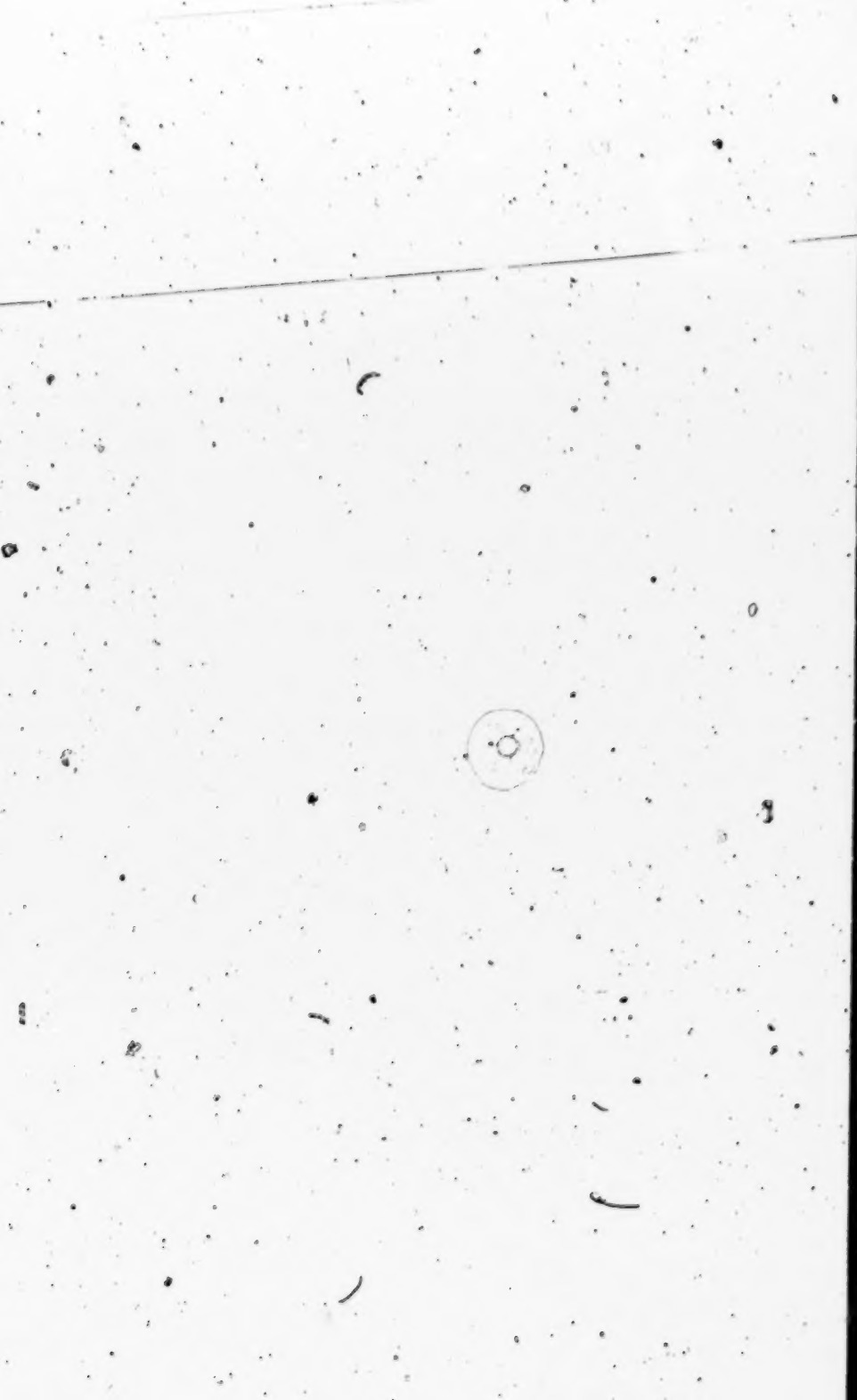
Dated: Philadelphia, Pennsylvania,
February 16, 1959.



Appendix.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed September 30, 1958)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 5, 1958

Before MARIS, GOODRICH and MCLAUGHLIN, *Circuit Judges*.

By MCLAUGHLIN, *Circuit Judge*.

This is an appeal on an *in personam* libel in admiralty brought against the owner of the ship in which occurred the accident whereby the harts suffered by libellant resulted. The libel alleged negligence on the part of the shipowner and unseaworthiness of the vessel. The shipowner impleaded libellant's employer.

The Haenn Ship Ceiling and Refitting Corporation had been engaged by the respondent shipowner to effect certain carpentry repairs to the fittings in the S.S. Sunion's # 5 hold while the vessel was at Philadelphia. In the early afternoon of March 4, 1953, Edward S. Mesle, an employee of Haenn, and a number of his co-workers descended into the lower hold which was outfitted for the bulk carriage of grain. Necessary for assuring the underway stability of the ship so engaged is the erection along the hold's center line of a device known as a shifting board. The function of the shifting board is to reduce the free surface effect resulting from the lateral flow of the grain following each roll of the ship.

The shifting board had been constructed by erecting three double sets of uprights, consisting of 2" by 10" or 2" by 12" planks spaced approximately eight feet apart, between which, 2" by 10" boards were nailed horizontally so as to form a bulkhead. This bulkhead was braced athwartships by nine shores on the port side and nine shores on the starboard side. Each of the three sets of uprights thus was braced by three shores on each side. The shores were 4" by 6" timbers. The top one in each tier of three extended down from the 'tween deck hatch coaming to an upright of the shifting board. Approximately 7' below this one the middle shore of the tier extended from the upright downward at an angle to where the outboard end butted against a sweat batten at the inboard face of a frame of the ship. About 7' below this middle shore the lower shore paralleled it from the upright to the same frame. Frames are 30" apart and are about 18" in depth; to their outboard faces the plates forming the skin of the vessel are attached.

The shores were secured in place by trimming the ends so as to butt one against the shifting board upright and the other against the batten at the frame. The ends were secured in place by being snugly framed with wooden cleats made of 2" by 3" pieces of wood several feet in length. On the inboard end the cleats were nailed to the shifting board. On the outboard end they were nailed to sweat battens. These sweat battens were 2" by 6" lengths of dressed lumber running horizontally, fore and aft, up the sides of the hold, about eight to ten inches apart, and held in place by L-shaped metal clips welded to the faces of the frames. The clips were open at the top to permit removal and insertion of the sweat battens. Sweat battens are for the prevention of contact with the plates by packaged cargo of a nature to be harmed by the water which condenses on the plates under certain conditions.

Mesle and his fellow workers were assigned to take out and replace the two middle shores in the port and starboard

iers bracing the after upright of the shifting board, both of the shores having become cracked at roughly the middle.

The men first went to work on the starboard side to remove the damaged shore located there. A line was thrown around the shore and a double turn taken around its middle. Both ends of the line were carried back to a recess in the after part of the hold above the shaft alley from where the men tugged at the line until the shore broke where it had been cracked. When this happened, the outboard end of the shore fell free to the bottom of the hold; the inboard end hung down from the nails which had toe-nailed it to the shifting board, its weight being insufficient to pull it free.

The men then repaired to the port side where they similarly attempted to break and pull down the damaged shore there. When it did not give, the men dropped the line, the foreman saying, "It looks like we're going to have to knock off a cleat there, Ed, get up there and knock one off."

Whereupon libellant climbed up the sweat battens at a point just forward of the shore until he was standing on the batten to which the end of the shore was fastened, some twelve feet above the floor of the hold. Turning about so that his heels were hooked on the batten and holding onto a higher batten with his left hand, he wielded a hatchet with his right to split away the cleat along the afterside of the shore. No sooner had the last of the cleat fallen away than the end of the shore unexpectedly slipped off the batten at the point the batten was in contact with the face of the frame, moving down, aft, and enough outboard so as to come between the frames vertically and the battens horizontally. This movement was enough to pull the other end of the shore loose from the shifting board so that it fell to the floor of the hold. The outboard end thus see-sawed upward, levering the batten above out of its clip thereby catapulting Mesle into the air from whence he landed heavily, severely injuring himself.

Inspection of the shore revealed that its ends had not been toe-nailed as was the usual custom. Had it been, the nails would doubtless have held the shore in place until some force was exerted to pull it down. The absence of the toe-nails could not have been discovered so long as the cleats were in place around the ends of the shore. The questions presented to the trial court were whether the ship's personnel, and through them the shipowners, had been negligent in permitting erection of the shore without toe-nailing and whether the shore so erected was unseaworthy.

The trial judge adopted the libellant's proposed findings of fact and conclusions of law, a practice which this court had disapproved on another occasion [1] as being an inadequate compliance with Admiralty Rule 46½. We have in mind the edict in McAllister v. United States, 348 U.S. 19 (1954) that a judgment in admiralty is not to be set aside unless it is clearly erroneous. And yet where the court has not independently set out its findings we think the reviewing court may more readily be ". . . 'left with the definite and firm conviction that a mistake has been committed.' " [2] The Severance, 152 F.2d 916 (4 Cir. 1945).

A duty owed by the shipowner to one in Mesle's position was the exercise of reasonable care in maintaining the premises in a condition safe for business invitees with due regard for the purposes calling for the presence of such invitees. In short the duty was the specific one of providing a reasonably safe place in which to work. The duty is not an absolute one, however. Lake v. Standard Fruit and Steamship Co., 185 F.2d 354 (2 Cir. 1950). Here, the duty would have been met had Mesle or his employer's representative been informed of the absence of toe-nails in the particular shore or had the alleged defect been repaired. But to require repair or warning would initially have required notice imputable to the shipowner. There is no evidence

1. The Plow City, 122 F.2d 816 (3 Cir. 1941).

2. McAllister v. United States, supra, p. 20, quoting United States v. Oregon Medical Society, 343 U.S. 326, 339 (1952).

that respondent or its servants had actual notice of the fact that the shore was not toe-nailed nor do we think that respondent can fairly be imposed with constructive notice thereof. The absence of toe-nails was not apparent, as has already been noted, once the cleats were in position. Thus even if the completed structure had been inspected by ship's personnel as is indeed the custom, the alleged defect would not have been visible upon such inspection. The adequacy of the cleating and the snugness of the shores would have been the subject of such inspection; these are enough for assurance that the shores will perform their function.[3] Under these circumstances to hold that the ship was negligent in not acquiring notice of the lack of toe-nails would in effect require supervision by the ship's personnel over the placing of every nail. This is obviously an impractical and unreasonable burden. We conclude that the trial court erred in finding any negligence on the part of respondent.

Having reached this point it is apparent that the judgment, if it is to be affirmed, must rest on the finding of existence of an unseaworthy condition. It suffices simply to note preliminarily that the shipowner's duty, originally owed only to seamen, of maintaining a vessel seaworthy in hull and appurtenances extends to shore-side workers furnishing to the vessel services which in a time of less specialized economic activity were usually rendered by the crew. Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). There is no question that the benefit of the shipowner's obligation runs to libellant.

"Seaworthiness" is another of those terms in the law which by reason of its appearance in different contexts has developed an elusiveness making impossible an omnisufficient definition. But in order to articulate our standard of judgment we must presume to attempt a definition of the term sufficient at least for the purposes of this case.

3. The evidence shows that Coast Guard regulations require cleating, but do not mention toe-nailing.

It is quite apparent that whether or not an appurtenance is "in fit condition * * * for a voyage and the incident perils of the sea"[4] is usually an irrelevancy. It is said that "(t)he concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose."[5] Yet examination of a great many personal injury cases in which claims of unseaworthiness were presented leads to the conclusion that those cases are of two categories, both of which fit this general definition. One is where the shipowner, having knowledge—actual or constructive—that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity; liability is imposed for failure to comply with this duty, termed one of making the vessel seaworthy.[6] The other category is where the equipment actually sup-

4. From a dictionary definition of "seaworthy".

5. Crumady v. The Joachim Hendrik Fisser, 249 F.2d 818 (3 Cir. 1957).

6. Some cases fitting this category in which recovery was permitted on the ground that unseaworthiness had been proved are Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); Halecki v. United N.Y. & N.J. Sandy Hook Pilot's Assn., 251 F.2d 708 (2 Cir. 1958); Buch v. United States, 220 F.2d 165 (2 Cir. 1955); Bentley v. Albatross S.S. Co., 203 F.2d 270 (3 Cir. 1953); Hawn v. Pope & Talbot, 198 F.2d 800 (3 Cir. 1952) (where the facts appear more fully than in Pope & Talbot v. Hawn, 346 U.S. 406 (1953)); Krey v. United States, 123 F.2d 1008 (2 Cir. 1941); The Seeandbee, 102 F.2d 577 (6 Cir. 1939); Christopher v. Greuby, 40 F.2d 8 (1 Cir. 1930); Pinion v. Mississippi Shipping Co., 156 F.Supp. 652 (E.D. La. 1957); Campbell v. Tidewater Associated Oil Co., 141 F.Supp. 431 (S.D.N.Y. 1956); Ladjimi v. Pacific Far East Line, 97 F.Supp. 174 (N.D.Cal. 1951); The Leontios Teryazos, 45 F. Supp. 618 (E.D. N.Y. 1942); The Edith Godden, 23 F.43 (S.D.N.Y. 1885).

Cases in this category which denied recovery because unseaworthiness was not shown are The Baymead, 88 F.2d 144 (9 Cir. 1937); Newport News Shipbuilding and Drydock Co. v. Watson, 19 F.2d 832 (4 Cir. 1927), (recovery permitted on proof of negligence, however); Hanrahan v. Pacific Transport Co., 262 F. 951 (2 Cir. 1919); The New York, 204 F. 764 (2 Cir. 1918); Smith v. United States, 66 F.Supp. 933 (D.C.Md. 1946); The Ubbergen, 30 F.2d 951 (E.D.N.Y. 1925), (recovery permitted on proof of unseaworthiness of second category however).

plied by the owner for doing the ship's work proves incapable of performing its function in the manner for which it was designed.[7]

7. Some cases in this category which granted recovery are Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Crawford v. Pope & Talbot, 206 F.2d 784 (3 Cir. 1953); The Fletero v. Arias, 206 F.2d 267 (4 Cir. 1953); Kulukundis v. Strand, 202 F.2d 708 (9 Cir. 1953); Read v. United States, 201 F.2d 758 (3 Cir. 1953); The Diamond Cement, 95 F.2d 738 (9 Cir. 1938); The H. A. Scandrett, 87 F.2d 708 (2 Cir. 1937); Ives v. United States, 58 F.2d 201 (2 Cir. 1932); Henry Gillen's Sons Lighterage v. Fernald, 294 F. 520 (2 Cir. 1923); The Colusa, 248 F. 21 (9 Cir. 1918); Thompson Towing & Wrecking Assn. v. McGregor, 207 F. 209 (6 Cir. 1913); The Fullerton, 167 F. 1 (9 Cir. 1908); LaFourche Packet Co. v. Henderson, 94 F. 871 (5 Cir. 1899); Maniatis v. The Archipelago, 159 F.Supp. 245 (E.D.Va. 1958); Green v. Orion Shipping & Trading Co., 139 F.Supp. 431 (D.C.Md. 1956); Cowan v. Inland Waterways Corp., 121 F.Supp. 683 (E.D.Ill. 1954); Capadona v. The Lake Arlin, 101 F.Supp. 851 (S.D.Cal. 1951); Stokes v. United States, 55 F.Supp. 56 (S.D.N.Y. 1944); The Harry Howard, 41 F.Supp. 19 (Mass. 1941); Adders v. United States, 5 F.Supp. 457 (E.D.N.Y. 1933); The Ubbergen, 30 F.2d 951 (E.D.N.Y. 1929); The Navarino, 7 F.2d 743 (E.D.N.Y. 1925); Hoof v. Pacific American Fisheries, 284 F. 174 (W.D.Wash. 1922); The Drumelton, 158 F. 454 (S.D.N.Y. 1907); Erquit v. N.Y. & Cuba Mail S.S. Co., 50 F. 325 (E.D.N.Y. 1892).

Some cases in this category which denied recovery are Crupady v. The Joachim Hendrik Fisser, 249 F.2d 818 (3 Cir. 1957); Shannon v. Union Barge Line Corp., 194 F.2d 584 (3 Cir. 1952); The Daisy, 282 F. 261 (9 Cir. 1922); Ludvigsen v. Commercial Stevedoring Co., 131 F.Supp. 337 (E.D.N.Y. 1955).

Some more cases in which recovery was denied but which additionally indicate that the defect rendering an appurtenance unseaworthy must be latent or inherent in the appurtenance itself are Cookingham v. United States, 184 F.2d 213 (3 Cir. 1950); Borgersen v. Skibs A/S Abu, 156 F.Supp. 282 (E.D.N.Y. 1957); Garrison v. United States, 121 F.Supp. 617 (N.D.Cal. 1954); Daniels v. Pacific-Atlantic S.S. Co., 120 F.Supp. 96 (E.D.N.Y. 1954); Adamowski v. Gulf Oil Corp., 93 F.Supp. 115 (E.D.Pa. 1950). But cf. Oakes v. Graham Towing Co., 135 F.Supp. 485 (E.D.Pa. 1955), where probably recovery should have depended on proof of negligence.

Cases which denied recovery by treating the question of unseaworthiness purely as one of negligence are The Tawmie, 80 F.2d 792 (5 Cir. 1936); The Cricket, 71 F.2d 61 (9 Cir. 1934); The Birkenhead, 51 F.2d 116 (E.D.Pa. 1930); Burton v. Grieg, 265 F. 418 (S.D.Ala. 1920); The Henry B. Fiske, 141 F. 188 (D.C.Mass. 1905).

The present case appears pretty clearly not to be one of the second category. The shore was capable of performing and did perform its function of supporting the shifting board under the stresses set up in a hold full of grain during a voyage. The absence of toe-nailing did not render the shore any less fit for this function so long as the cleats stayed in place. The crack in the shore undoubtedly reduced its capability, but if that were to be relied upon for establishing unseaworthiness of the shore, libellant's engagement in correcting the very defect would make it obvious that the shore was not warranted as seaworthy in that respect. Bruszewski v. Isthmian S.S. Co., 163 F.2d 720 (3 Cir. 1947). The case must, therefore, be one of the first category.

The question in its final analysis thus is reduced to whether the shipowner had the absolute duty—meaning that he would be imposed with liability regardless of negligence for any harm resulting from breach thereof—to supply toe-nailing in the shore.[8] Cumulative and uncontradicted testimony was that shores were invariably erected in a manner which required insertion of nails before the required cleats were positioned. Although, as has been noted, cleating alone is sufficient under the applicable Coast Guard regulations, those regulations are concerned only with the adequacy of the structure for preventing excess movement of the cargo at sea. They do not purport to be concerned with the safety of personnel engaged in erecting or tearing down the structure. But the shipowner must be so concerned; it knows the structure will be taken down. In light of the custom of toe-nailing shores it is anticipatable that the custom may be relied upon somehow in the dismantling process for an assumption that a shore will remain in place after its cleats have been removed. The shore which was not toe-

8. Even the imposition of absolute liability depends upon the injured person's being one whom "* * * the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity * * *." Restatement, Torts, § 519.

nailed, then, was not reasonably safe for dismantling by one of the customary methods, which in fact was used here; it was therefore unseaworthy.

The cases which we feel compel the result (cited in footnote 6) might alternatively have rested on findings of negligence. The point is, however, that they did not. Thus the concept of unseaworthiness which we have attempted to articulate by distillation from those cases and have applied here has evolved to support a recovery amounting to the imposition of absolute liability, chiefly by reliance on cases supporting the closely allied concept which we have here referred to as the second category of unseaworthiness. Those cases had already reached the point of imposing absolute liability for unseaworthiness.

It has already been intimated that since libellant was not engaged in remedying the very defect which caused his injury, the warranty of seaworthiness of the structure in respects other than that calling for repair continued to run to him. Kruszewski v. Isthmian S.S. Co., supra, consequently does not control this case. See Gindville v. American Hawaiian S.S. Co., 224 F.2d 746 (3 Cir. 1955).

Respondent also appealed from the dismissal of its claim over against the libellant's employer whom it had impleaded. The only possibility by which indemnity might be had in the circumstances under which libellant's judgment is affirmed would require Haenn to have been the contractor who originally erected the shifting board and the shoring. See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). There is no evidence as to the existence of such a relationship.

The judgment in favor of libellant and the impleaded respondent will be affirmed.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON PETITION FOR REHEARING.

(Filed November 18, 1958)

Before MARIS, GOODRICH *and* MCLAUGHLIN, *Circuit Judges.*

PER CURIAM:

Recovery was here affirmed on the ground of unseaworthiness. Since there was no evidence of impleaded respondent's responsibility for the particular condition, the third party complaint against it was necessarily dismissed.

The opinion did not discuss the question of whether the shipowner had failed to provide a safe place to work in permitting the stevedore to employ the method it used for removing the shore. The lack of discussion was because the sole ground urged for such method having been foreseeably unsafe was that the shore might not have been toe-nailed. In that view, the proximate cause would still have been the existence of the unseaworthy condition. Since we considered it unreasonable to charge the shipowner with notice of that defect,[1] it is implicit in the opinion that it would have been even more unreasonable to so charge the stevedore.

The petition for rehearing will be denied.

1. See Filipek v. Moore-McCormack Lines, 258 F.2d 7[illegible] (2 Cir. 1958) reported since the opinion in this case was filed.